IN THE

Supreme Court of the United States

No __, Original

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v

STATE OF NORTH CAROLINA,

Defendant

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Plaintiffs, four of the member States of the Southeast Interstate Low-Level Radioactive Waste Management Compact and the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission"), by their undersigned counsel and their respective Attorneys General and pursuant to 28 U.S.C. § 1251(a) and to Rule 17 of the Rules of this Court, move for leave to file their Complaint against the State of North Carolina, for the reasons stated herein.

This is the second motion for leave to file a bill of complaint addressing the dispute among the member States of the Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact"). This Court denied the initial motion after requesting and receiving from the United States a brief *amicus curiae* that expressed the view that this Court did not have exclusive original jurisdiction

over a suit filed *solely* by the Commission against a member State of the Compact App A 1a-23a The United States also expressed its view that this Court would have exclusive original jurisdiction over an action by "one or more States that are parties to the Compact against another party State to enforce the Compact and seek an appropriate remedy" U S Brief at 18 (citing cases) (App A 21a) This motion seeks leave to file such a suit

INTRODUCTION

In 1980, the United States Congress enacted the Low-Level Radioactive Waste Policy Act, which was amended by the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act See Pub L No 96-573, 94 Stat 3347 (1980) and Pub L No 99-240, 99 Stat 1859 (1986) (collectively, the "Federal Acts") The Federal Acts recognized that it is primarily the responsibility of the states to dispose of low-level radioactive waste, and encouraged the states to form regional interstate compacts to develop disposal facilities in an efficient and effective manner The Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact"), which is both a contract among the member States and a statute, was formally adopted by North Carolina in N C Gen Stat § 104F The legislatures of all the other member States[1] similarly entered into the Compact by enacting enabling legislation On January 15, 1986, as part of the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Congress consented to the Compact, thereby making it a federal law Pub L No 99-240, Tit II, 99 Stat 1859 (1986)

When the Compact was enacted, South Carolina already had a disposal facility which could be used by the member

[1] The original party states to the Compact were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia Pub L No 99-240, Art 7(A), 99 Stat 1859, 1878 (1986)

States, but was scheduled to close it within several years of the enactment of the Compact Consequently, one of the missions of the Commission that was created by the Compact was to develop criteria and procedures for identifying one of the member States as a host for the next regional disposal facility In September 1986, after a lengthy technical review and screening process by the Commission and outside consultants, North Carolina was designated by the Commission as the next host State North Carolina willingly accepted this designation and commenced efforts to select and license a site North Carolina also willingly accepted significant financial assistance from the Commission Nevertheless, after more than a decade, no disposal facility ever has been licensed, let alone constructed, in and by North Carolina

The language of the Compact is clear that the host State has complete responsibility for site development and that the Commission bears no responsibility to pay the costs associated with building a disposal facility However, at the request of North Carolina and to promote the timely creation of a new facility, the Commission provided nearly $80 million to North Carolina for the purpose of facilitating North Carolina's efforts This money was raised exclusively by levying fees and surcharges on wastes being disposed of at the first regional disposal facility in Barnwell, South Carolina When, in 1995, South Carolina withdrew from the Compact, due in large part to the State's frustration over the inordinate delays encountered with the North Carolina project, the Barnwell facility was no longer available as the regional facility for the Southeast Compact This action had the practical effect of eliminating the Commission's only source of revenue, such that the Commission no longer had funds to assist North Carolina's efforts to license and construct a disposal facility Although not obligated to do so, the Commission made repeated attempts to develop funding alternatives acceptable to North Carolina Rather than

working with the Commission in its attempts to resolve the issue cooperatively, North Carolina erroneously asserted that the Commission was required to continue to provide funding and was in breach by failing to do so Eventually, North Carolina closed down the project when the Commission had no option but to cease sending money to North Carolina

As a consequence of North Carolina's intransigence, Florida and Tennessee filed with the Commission a Sanctions Complaint, alleging that North Carolina was in breach of the Compact and seeking sanctions against North Carolina After notice and a hearing presided over by an impartial administrative law judge at which evidence was taken, the Commission unanimously found that North Carolina was in breach of the Compact As Commissioner Richard Hunter of Florida explained

> North Carolina enjoyed substantial benefits in protecting its public health as a member of this Compact through the years, and when it came time for them to do their part they were unable to meet those obligations in a timely manner and ultimately decided that they would not play

Statement of Commissioner Hunter, December 8, 1999 Sanctions Hearing Transcript (hereinafter "Tr ") at 34-35 (App B 25a) Based on the record evidence demonstrating both breach and the amount of money provided by the Commission to North Carolina, the Commission concluded that North Carolina should disgorge the monies paid by the Commission Accordingly, the Commission ordered North Carolina to repay to the Commission $79,930,337, plus interest from the date North Carolina ceased activities to develop the requisite facility, January 1, 1998 In addition, the Commission ordered North Carolina to pay $10 million for the loss of a source of funds for the Commission's operating budget for a period of 20 years, and attorney's fees North Carolina has defied the Commission's order and refused to pay the sanction

Accordingly, Plaintiffs invoke this Court's exclusive original jurisdiction to vindicate their rights under the Compact and any other rights they may have at common law to recover the money that North Carolina accepted without fulfilling its corresponding duty to create a disposal facility, and to enforce the Sanction Order entered against North Carolina by the Commission

STATEMENT OF THE CASE

A. The Southeast Interstate Low-Level Radioactive Waste Management Compact.

The Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact") was enacted by each State, including North Carolina, see, *e.g.*, N C Gen Stat § 104F (repealed eff July 22, 1999), and subsequently was consented to by the United States Congress on January 15, 1986 as part of the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act Compact, Pub L No 99-240, Tit II, 99 Stat 1859 (1986) The original member States in the Compact were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia *Id.*, Art 7(A), 99 Stat at 1878

The Compact was enacted in recognition of several policy objectives First, by entering into the Compact, the States "recognize[d] and declare[d] that each state is responsible for providing for the availability of capacity either within or outside the State for disposal of low-level radioactive waste generated within its borders," and that "management of low-level radioactive waste is handled most efficiently on a regional basis" *Id.*, Art 1, 99 Stat at 1871 Further, the States "recognize[d] that the safe and efficient management of low-level radioactive waste generated within the region requires that sufficient capacity to dispose of such waste be properly provided" *Id.* at 1872 In addition, "[i]t is the policy of the party states to enter into a regional low-level

radioactive waste management compact for the purpose of providing the instrument and framework for a cooperative effort [and for] provid[ing] sufficient facilities for the proper management of low-level radioactive waste generated in the region." *Id.*

The Compact, by its terms, created the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission" or "Compact Commission"), consisting of two voting members from each member State, to be appointed according to the laws of each State *Id.*, Art 4(A), 99 Stat at 1874 The first disposal facility serving the member States was the existing low-level radioactive waste disposal facility located in Barnwell County, South Carolina Pub L No 101-171, sec 2, Art 7(H), 103 Stat 1289, 1289 (1989) Among the Commission's duties was to develop and adopt procedures and criteria for identifying a State as a host State for a regional facility and to identify a host State for the development of a second regional disposal facility Compact, Art 4(E)(6), 99 Stat at 1875 Further, the Commission was authorized to ensure that this second regional disposal facility would be licensed and ready to operate as soon as required, but in no event later than 1991 *Id*

The Compact requires that each member State that is designated as a host State must take "appropriate steps" to ensure that an application for a license to construct and operate a facility is filed with and issued by the appropriate regulatory authority *Id*, Art 5(C), 99 Stat at 1877 Further, Article 3(C) states that host States "are responsible for the availability, the subsequent post-closure observation and maintenance, and the extended institutional control of their regional facilities" *Id.* at 1873-74 Moreover, the Compact expressly states that the Commission is "not responsible for any costs associated with (1) the creation of any facility" *Id.*, Art 4(K), 99 Stat at 1876

The Compact also vests in the Commission the power to revoke the membership of a member State that "willfully

creates barriers to the siting of a needed regional facility." *Id.*, Art 4(E)(7), 99 Stat at 1875 If the Commission resolves to revoke the status of a State as a party to the Compact, it must provide written notice of the action to the Governors, Presidents of the Senates, and Speakers of the Houses of Representatives of the member States, as well as to the chairpersons of the appropriate committees of Congress *Id.*, Art 7(F), 99 Stat at 1879 The Compact further provides for other remedies against recalcitrant member States

> Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction

Id

B. The Present Controversy.

In September 1986, following a lengthy screening and review process by the Commission and outside consultants, the Commission, by a two-thirds majority vote, selected the State of North Carolina as the second host State The designation of North Carolina as the host State obligated North Carolina to develop and operate a facility to receive the region's low-level radioactive waste for disposal for a period of 20 years As provided in the Compact, North Carolina, as the host State, had the responsibility for financing, siting, licensing and constructing the facility In turn, North Carolina would be repaid for its expenses from revenues generated by the facility, once operational North Carolina acknowledged this financial arrangement by the enactment of N C Gen Stat § 104G-15 (repealed eff July 1, 2000), which

speaks of recovery of the State's costs through the imposition of fees by the operating facility

Following the designation of North Carolina as host State, the North Carolina General Assembly considered, but rejected in August 1987, a bill to withdraw from the Compact Instead, the General Assembly enacted a law developing the siting authority the North Carolina Low-Level Waste Management Authority (the "North Carolina Authority") As further evidence of its recognition of its host State status, North Carolina proposed amendments to the Compact concerning the length of time a disposal facility was required to act as the regional facility and concerning the terms for withdrawing from the Compact The proposed amendments, which made it more difficult for States to withdraw after the second disposal site opened, were adopted by all member States and consented to by Congress Pub L No 101-171, sec 2, 103 Stat at 1289

Although not obligated to do so, see Compact, Art 4(K), 99 Stat at 1876, in response to a request from North Carolina, the Commission determined in 1988 that it was "appropriate and necessary" for it to provide financial assistance to any State designated as the next host State "for the initial planning and administrative costs and other pre-operational costs associated with that state's obligation to create and operate a regional facility" See Feb 9, 1988 Resolution (App C 34a) Accordingly, the Commission voted to appropriate $200,000 in its annual budget to a trust fund for that purpose In total, the Commission provided $1,200,000 to North Carolina through this fund

In December 1988, Governor Campbell of South Carolina notified the Commission that the Barnwell facility would cease to serve as the regional disposal facility on December 31, 1992 Subsequently, in 1989, at North Carolina's request, the Commission adopted a Capacity Assurance Charge on regional waste going to the Barnwell, South Carolina facility to provide funds "[t]o assure the timely development of the

second regional disposal facility in North Carolina " See Oct 24, 1989 Commission Minutes (App D 39a) These funds were intended to support the licensing phase of North Carolina's site development The Commission provided $19,733,816 to North Carolina through the collection of this Capacity Assurance Charge between January 1, 1990 and December 31, 1992

In July 1990, after years of assurances that the January 1, 1993 target date for completion of the construction of the facility was feasible, the North Carolina Authority submitted a revised work plan, which put completion of the project two years behind schedule and nearly doubled the cost, excluding construction costs To assist with the increased costs, the Commission established an Access Fee on regional waste going to the Barnwell, South Carolina facility Once again, these funds were intended for use in the development of the facility in North Carolina See Nov 15, 1990 Commission Minutes at Attach A (App E 51a-52a) A total of $12,012,795 in Access Fees was collected and provided to North Carolina

In October 1991, the North Carolina Authority announced a new siting schedule, with the site's opening set for February 1996 In February 1992, the Commission recommended that the Barnwell facility remain open, provided certain conditions were met, including meeting certain milestones with regard to the development of the North Carolina facility In June 1992, the South Carolina Legislature voted to allow the Barnwell facility to remain open as the regional disposal site until January 1, 1996

In its continued effort to assist North Carolina in developing the much-needed second disposal facility, the Commission implemented an Out-of-Region Access Fee on out-of-region waste going to the Barnwell, South Carolina facility during the period January 1, 1993 through June 30, 1994 See Sept 28, 1992 Commission Minutes at 2-5 (App F 60a-65a) The charge was $220 per cubic foot of out-of-

region waste, with $160 of this fee going to South Carolina and $60 going to the Commission Through the collection of this fee, the Commission provided an additional $23,459,786 to North Carolina for use in connection with the licensing and development of the disposal facility

In addition to the foregoing, at North Carolina's request, the Commission levied $3,000,000 per quarter in access fees on southeast waste generators for the period January 1, 1993 through December 31, 1995 "[i]n order to assure the continued development of the second regional disposal facility for low-level radioactive waste in North Carolina" See Nov 13, 1992 Commission Minutes at 3 (App G 66a) A total of $23,405,699 of this access fee was collected and provided to North Carolina By December 1993, the North Carolina Authority had selected a proposed site in Wake County, North Carolina and had submitted a license application for that site

Next, the Commission granted North Carolina's request for the advancement of money from the Regional Access Fee fund "when necessary on a documentated [sic] basis not to exceed a total of $3 Million" See Apr 29, 1994 Commission Minutes at 6 (App H 68a) In August 1994, the North Carolina Division of Radiation Protection, the State's licensing authority, announced there would be a 15-month delay in the licensing process, thereby further postponing the opening of the North Carolina facility until at least June 1997, assuming no construction or litigation delays In December 1994, the North Carolina Authority approved an additional one-year delay, postponing the opening of the new facility until 1998

By this time, South Carolina leaders were incensed by North Carolina's lack of progress and doubted that North Carolina ever would open the second regional facility. In May 1995, the Commission met twice to consider a South Carolina proposal intended to punish North Carolina for its lack of progress and to create a sense of urgency in North

Carolina to open the disposal facility The proposal would have denied access to Barnwell to North Carolina until North Carolina issued the license for the new facility Because the denial of access for North Carolina was considered a sanction against North Carolina, the vote required a two-thirds majority for approval The Commission voted on South Carolina's proposal twice, and both times the resolution failed by a single vote

Due the lack of assurance that North Carolina ever would open a second regional disposal facility, South Carolina withdrew from the Compact in July 1995 Consequently, the Commission no longer could levy fees and surcharges on waste disposed of at the Barnwell facility This eliminated the traditional source of revenue to fund the Commission's operations, as well as the source of revenue from which the Commission had been providing funds to North Carolina to assist in site development activities See Tr at 54 (App B 27a) (Question (by Mr Jones) "When a source of funding from Barnwell was cut off to the Commission, was there any other major source of funding to the Commission from which funds could be given to the State of North Carolina?" Answer (by Commissioner Mobley) "No We had no other funding other than some interest on our accrued funds "), *id.* at 83-84 (App B 30a) (same)

On January 5, 1996, the Chairman of the Commission, Richard S Hodes, M D , wrote to North Carolina Governor James B Hunt, Jr to explain that the Commission, up to that point in time, had contributed $55 million to North Carolina in furtherance of the facility development project but that additional Commission funds would eventually be unavailable Chairman Hodes encouraged Governor Hunt to begin considering alternative funding opportunities, consistent with North Carolina's obligations under the Compact See Jan 5, 1996 Hodes letter to Hunt at 3 (App I 73a) Chairman Hodes sent several subsequent letters to Governor Hunt reminding him that, by law, the designated

host State is responsible for siting, licensing, building and operating the facility, and that this responsibility includes providing the necessary funding See, *e g.*, Apr 25, 1996 Hodes letter to Hunt (App J 75a-77a), May 10, 1996 Hodes letter to Hunt (App K 78a-79a)

Nevertheless, on June 14, 1996, Governor Hunt informed the Commission that "North Carolina [was] not prepared to assume a greater portion of the project costs If the Commission is not willing or able to continue funding the North Carolina licensing effort, it simply will not be able to proceed " See June 14, 1996 Hunt letter to Hodes at 2 (App L 81a) In taking this position, Governor Hunt ignored the plain language of the Compact, which clearly states the Commission is "not responsible for any costs associated with (1) the creation of any facility " Compact, Art 4(K), 99 Stat at 1876 Neither Governor Hunt nor the North Carolina Authority made a request to the North Carolina General Assembly to appropriate the necessary funds Further, the General Assembly was aware of the problem yet made no effort to provide the funds Nevertheless, the Governor continued to blame delays on the Commission's alleged failure to provide North Carolina with adequate funds See July 18, 1996 Hunt letter to Hodes (App M 82a) (North Carolina requested $4 million necessary to go forward with the project, "If the project is delayed, it will be the result of the Commission turning down the funding request ") Contrary to Governor Hunt's allegations, however, the Commission continued to offer interim funding to North Carolina See July 9, 1996 Hodes letter to Hunt (App N 85a) The fact is that the delays actually were caused by North Carolina itself *E g*, July 18, 1996 Hodes letter to Hunt (App O 86a-87a) For example, in June 1996, the North Carolina Authority adopted a Licensing Work Plan under which the facility would not open until 2001, assuming no construction or litigation delays, for reasons wholly apart from funding issues Implementation of the Licensing Work

Plan alone would have cost an additional $26 million – more than the total amount of funds remaining available to the Commission

Despite the foot-dragging of North Carolina and in a good faith effort to move the licensing and construction project along, the Commission authorized, subject to compliance by North Carolina with five conditions, the release of funds on a quarterly basis to the North Carolina Authority to cover amounts expended by the Authority in performing the licensing work plan developed by the Authority See Oct 3, 1996 Commission Minutes at 2-4 (App P 88a-93a) In order to implement this program, the Commission authorized providing a total of $6 5 million to restart and move forward with the North Carolina project, which had been closed down by the North Carolina Authority in July 1996, allegedly due to a lack of funds

In 1997, the Commission voted to release an additional $2 9 million to the North Carolina Authority, based on the affirmative recommendation of the Authority that it "ma[de] sense to proceed with the project" See Apr 18, 1997 Commission Minutes at 4 (App Q 96a) Subsequently, the Commission voted to approve the North Carolina Authority's request for additional funding up to $1 4 million for the months of August and September Funding beyond the $1 4 million would be considered upon receipt by the Commission of a successful progress report by the North Carolina Department of Environment and Natural Resources See July 22, 1997 Commission Minutes (App R 102a) Finally, in August 1997, the Commission voted to provide interim stop-gap funding to the North Carolina Authority up to $1 2 million See Aug 21, 1997 Commission Minutes at 5 (App S 105a)

Despite the Commission's numerous efforts to resolve (and to urge North Carolina to resolve) the funding problems, no solution was reached Consequently, the Commission organized a Task Force for Facility Funding (the "Task

Force") to study the issue and make recommendations for funding alternatives The Task Force included volunteer representatives of the North Carolina Authority, the Commission, waste generators and the public The Task Force issued a consensus report in May 1997 that included specific recommendations for funding The Commission approved the recommendations in July 1997

A group of regional waste generators developed a draft Memorandum of Understanding ("MOU") that implemented the Task Force's recommendations The Commission transmitted to Governor Hunt the draft MOU in August 1997 See Aug 28, 1997 Hodes letter to Hunt at 1 (App T 106a-107a) Under the proposed MOU, the Commission and volunteer generators would have funded the remainder of the licensing costs in return for certain commitments from North Carolina Upon transmission of the proposed MOU, the Commission asked the North Carolina Authority either to endorse the proposal or to propose an alternative method of funding by December 1, 1997, as a condition of future funding More than two months later, and more than ten years after North Carolina accepted the designation as the next host State, Governor Hunt responded to the Commission by raising several concerns about the proposal, but without making any commitment to proceed absent the Commission "com[ing] up with some approach that provides the relatively few dollars needed to complete *licensing* without jeopardizing the future operation and financing of the facility" Nov 3, 1997 Hunt letter to Hodes at 2 (App U 111a-112a) (emphasis added) Governor Hunt did not accept the Commission's offer to fund the project through the Memorandum of Understanding, nor did he suggest an alternative method of funding

Chairman Hodes responded by, among other things, reiterating that it was "the intent of the compact law to [distribute costs] by obligating each party state, in turn, to develop and operate a facility It has always been the intent

of the law that each host state would be repaid for its expenses from facility revenues" Nov 14, 1997 Hodes letter to Hunt at 2 (App V 116a), see also Tr at 40, 62-63 (App B 26a, 28a) Chairman Hodes also restated the Commission's position that, if an agreement in principle regarding funding could not be reached by December 1, 1997, the Commission would not provide funding for work performed after November 30, 1997 Nov 14, 1997 Hodes letter to Hunt at 2 (App V 116a), see also Tr at 82-84 (App B 29a-31a)

By December 1, 1997, North Carolina had neither endorsed the MOU nor proposed any other funding plan Instead, the Chair of the North Carolina Authority notified the Commission of the Authority's decision to "commence the orderly shutdown of the project" pending instruction from the North Carolina Legislature or the Commission's reversal of its position regarding funding See Dec 19, 1997 Corgan letter to Hodes at 3 (App W 119a) Chairman Corgan stated that it was "North Carolina's view that the Compact Commission and the other member states have failed to honor their commitments under the compact law and made further performance by the Authority impossible" *Id* at 1 (App W 117a) Like Governor Hunt, Chairman Corgan attempted to lay the blame on the Commission for North Carolina's failure to develop a disposal facility in the over eleven years since North Carolina had been designated the next host State "It is extremely unfortunate that the Compact's actions have caused the project to be stopped The Authority has no real choice but to commence a project shutdown given the Compact's unwillingness to spend its existing funds" *Id* at 3 (App W 120a) The Commission notified the North Carolina Authority in January 1998 that the shut down constituted a breach of the Compact by North Carolina

Between January 1998 and April 1999, the Commission participated in efforts to negotiate with the North Carolina Authority to resolve the dispute between North Carolina and

the Commission and the other States in the Compact No satisfactory resolution was reached

On April 26, 1999, Chairman Hodes notified Governor Hunt that the "Commission believes that the State of North Carolina currently stands in violation of the compact law, threatening the health and safety and economic well-being of the citizens of seven states, by failing to proceed" with the development of the disposal facility See Apr 26, 1999 Hodes letter to Hunt (App X 124a-125a) Hodes asked that North Carolina provide the Commission with a written plan and schedule for North Carolina to bring itself into compliance with compact law and to provide a disposal facility for the region North Carolina took no action in response

Due to North Carolina's failure to fulfill its obligations, the States in the Compact found themselves without a new regional disposal facility after waiting more than twelve years for North Carolina to develop one During those twelve years, North Carolina enjoyed the benefits of being a member of the Compact, including access to waste management and disposal services and reduced disposal fees Nevertheless, after paying directly or indirectly most of the $80 million provided to North Carolina, the member States had nothing to show for this enormous investment Frustrated and without other recourse, on June 21, 1999, the Commissioners of the States of Florida and Tennessee filed with the Commission a Sanctions Complaint against North Carolina. (App Y 127a-131a) The Sanctions Complaint alleged that North Carolina failed to fulfill its obligations as a member State in the Compact and as the designated host State by not providing a disposal facility for the region Further, the Sanctions Complaint requested, among other things, return of the $79,930,337 in funds the Commission had provided to North Carolina to assist in the licensing and development of the disposal facility, plus interest from the date North Carolina

ceased activities to develop the requisite facility, January 1, 1998

On July 26, 1999, North Carolina purported to exercise its rights under Article 7(G) of the Compact to withdraw from the Compact 1999 N C Sess Laws 357 North Carolina claimed that it "had no option but to" withdraw as a result of the Commission's breach (by terminating supplemental funding as of December 1, 1997) of the Compact See Dec 1, 1999 Easley letter to Hodes at 1 (App Z 133a)

In August 1999, the Commission adopted the recommendation of the Sanctions Committee to initiate a formal inquiry into the complaint filed against North Carolina On November 8, 1999, the Commission provided North Carolina with formal notice of a sanctions hearing to be held on December 8, 1999 See Nov 8, 1999 Haynes letter to Hunt (App AA 135a-136a) Attorney General Easley mistakenly asserted that having withdrawn from the Compact, North Carolina no longer was subject to the jurisdiction of the Commission Further, he claimed that the Commission lacked authority to conduct a sanctions proceeding against a State that had voluntarily withdrawn from the Compact See Dec 1, 1999 Easley letter to Hodes at 2 (App Z 133a) Finally, Mr Easley informed Chairman Hodes that North Carolina would not participate in the sanctions proceeding and would "vigorously oppose any effort by the Commission to impose sanctions or retain further jurisdiction" over the State *Id.* (App Z 133a-134a)

The Commission held a Sanctions Hearing on December 8, 1999 The Commission heard testimony and received documentary evidence from the States of Florida and Tennessee All of the Commissioners were permitted to ask questions and make comments Comments also were received from members of the public In addition, North Carolina, which had a representative present at the hearing, again was provided the opportunity to offer any testimony or

other evidence on its behalf North Carolina steadfastly chose not to exercise its rights under the Compact to defend itself

By a unanimous vote, the Commission found that North Carolina had failed to fulfill its obligations under the Compact Consequently, the Commission voted to require North Carolina to repay the $79,930,337 in funds it had received from the Commission for use in licensing and developing a disposal facility, plus interest from January 1, 1998, the date North Carolina ceased activities to develop the requisite facility The Commission also voted to require North Carolina to pay $10 million for the loss of the source of funds the facility would have provided to the Commission's operating budget for 20 years, and the Commission's attorneys' fees North Carolina was given until July 10, 2000 to comply with this order See Dec 9, 1999 Resolution (App BB 137a-138a) Immediately following the announcement of the Commission's decision, the North Carolina Attorney General stated in a press release that North Carolina would not repay the funds See Dec 9, 1999 Press Release (App CC 139a-140a)

The deadline for North Carolina to comply with the order passed with no action As a result, on July 10, 2000, the Commission, on behalf of the remaining member States (with the exception of North Carolina), moved for leave of this Court to file a bill of complaint against the State of North Carolina The Commission asked the Court to exercise its original jurisdiction over the dispute based on a provision of the Compact which vests the Commission with authority to stand in the shoes of the member States in litigation before any court Compact, Art 4(E)(10), 99 Stat at 1875 In September 2000, North Carolina filed its Brief in Opposition to the Commission's motion, arguing primarily that the case was not appropriate for the exercise of original jurisdiction because the Commission is not a state

In October 2000, this Court invited the views of the Solicitor General regarding the Commission's suit against

North Carolina On May 30, 2001, the Acting Solicitor General responded to the Court's request by filing a Brief as Amicus Curiae, asserting that the Commission is not a State and that it is unclear whether Congress may permissibly authorize an entity created by an interstate compact to invoke the Court's original jurisdiction on behalf of its member States The brief did point out that the absence "of original jurisdiction over a suit by the Commission would not preclude one or more States that are parties to the Compact from bringing an original action under 28 U S C 1251(a) against another party State to enforce the Compact and seek an appropriate remedy" U S Brief at 17-18 (App A 21a)

In June 2001, this Court denied the Commission leave to file its bill of complaint without addressing the merits of the complaint

'Since June 2001, North Carolina has taken no steps to resolve matters with the Commission or the States The gravity of the situation has not changed, however, for the States that are members of the Compact The States remain without a regional disposal facility Currently, waste generators from the member States send their waste either to Barnwell, South Carolina or to a facility in Utah The Barnwell facility is scheduled to close to all waste generators outside of the Atlantic Compact region in 2008, and is scaling back on the amount of out-of-region waste it will accept each year until then The facility in Utah currently accepts only limited types of low-level radioactive waste The problem is apparent – the member States are gradually running out of alternatives for disposing of their waste and need funds to enhance their ability to secure new disposal alternatives

Consequently, the States of Alabama, Florida and Tennessee and the Commonwealth of Virginia, along with the Commission, have accepted the implicit invitation of the United States to file an original action against North Carolina pursuant to 28 U S C § 1251(a), see U S Brief at 17-18 (App A 21a) They bring this action against North Carolina

to enforce the Compact or otherwise to obtain redress for North Carolina's wrongful conduct

REASONS THE COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION

This case involves a dispute among North Carolina, on the one hand, and the remaining member States and the Commission, on the other At issue is the proper interpretation and enforcement of the Compact's requirements Plaintiffs urge this Court, *inter alia,* to determine under the Compact (1) whether the imposition of the sanctions in this case, including the disgorgement of the $79,930,337 provided to North Carolina to license and develop a regional disposal facility that was never licensed, let alone completed, was a valid exercise of the Commission's sanction authority, as set forth in Article 4(F) of the Compact, and (2) whether North Carolina is obligated to comply with the Sanctions Order issued by the Commission, including repaying to the Commission $79,930,337 plus interest Having previously recognized its exclusive original jurisdiction to resolve disputes among sovereign states arising under compact laws, this Court is uniquely competent to interpret the relevant interstate compact provisions

Action by this Court is particularly warranted because serious public health concerns are at stake in this dispute The States belonging to the Compact have been without a regional disposal facility since 1995, when South Carolina withdrew from the Compact in frustration over North Carolina's steadfast failure to develop a disposal facility Moreover, since 1995, the Commission has been without any means of raising the significant funds needed to obtain disposal capacity or to fund Commission operations The States and generators must either find a way to store their radioactive wastes at hundreds of locations throughout the region or discontinue the activities that generate the waste As a result, the objectives of Congress in enacting the Low-

Level Radioactive Waste Policy Act have been thwarted and there exists a serious threat to the public health and safety the longer this region remains without a regional disposal facility

Critically, too, this case is not susceptible to expeditious, impartial resolution in any other forum This Court has exclusive original jurisdiction over controversies among states The Compact establishes the authority of the Commission to impose sanctions against member States that fail to fulfill their obligations under the Compact, Compact, Art 7(F), 99 Stat at 1879, but does not provide for judicial review of such sanctions determinations Accordingly, where disputes about sanctions arise between member States of the Compact, the resolution of those disputes necessarily falls to this Court See *Texas* v *New Mexico*, 462 U S 554, 569-70 (1983), see also *Kansas* v *Colorado*, 514 U S 673 (1995)

Specifically here, Florida and Tennessee pursued the only mechanism expressly available to them, *viz.*, a sanctions hearing before the Commission against North Carolina North Carolina was provided with formal notice and a full opportunity to be heard [2] A hearing was presided over by an experienced, impartial officer who was a retired state court judge Testimony was heard, documentary evidence was received, and the decision to impose sanctions, including restitution, was unanimously approved by the Commission North Carolina, despite two invitations to participate in the proceeding and present evidence on its behalf,[3] opted not to participate in the Sanctions Hearing

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[2] North Carolina was served with notice by certified mail Nov 8, 1999 Haynes letter to Hunt (App AA 135a) Receipt of notice was acknowledged by the Attorney General of North Carolina *See* Dec 1, 1999 Easley letter to Hodes at 1 (App Z 132a)

[3] North Carolina, which had a representative present at the Sanctions Hearing, again was urged to present evidence at the Hearing itself *See* Tr at 93 (App B 32a-33a)

At a fundamental level, North Carolina's attempt to shirk the responsibilities it voluntarily assumed by becoming a member of the Compact would have a chilling effect on other states in similar situations if North Carolina were permitted to succeed As Commissioner Charles Hawkins of Virginia noted during the Sanctions Hearing

> If compacts have no more validity than this one does, and being able to withdraw at a time that you feel is to your convenience, the whole concept falls apart This goes beyond this compact, this goes beyond this group of states, this goes into the arena of what we can depend on as we enter into agreements among consenting states for the betterment of our citizens
>
> [I]f something is not in place to bring some sort of stability to the commitments made, no state, no general assembly will be willing to go on record to support any other compact with their moneys or their time or their efforts, knowing full well that at any point during the process, a state can withdraw based on the whim of that particular legislative body And that's no way to build agreements

Tr at 91-92 (App B 31a-32a) Commissioner Hawkins' concerns were shared by Alternate Commissioner A C McNeer of Virginia

> [I]f we don't resolve this issue here, it has national implications and, for the future of the compact system itself, I think we have to resolve it in a responsible way or we're inviting trouble

Id. at 92 (App B 32a) The Commission did just that, within the bounds of its contractual and statutorily created authority, and its decision should be upheld and enforced

Because North Carolina has refused to comply with its obligations and with the Sanctions Order, Plaintiffs must seek judicial relief to declare the Sanctions Order valid and to

enforce the Commission's action The circumstances of this case, in which a super-majority of the member States have imposed a sanction on another State, pursuant to the method agreed upon by the States at the time of ratification of the Compact, warrant the exercise of this Court's exclusive original jurisdiction Were this Court to decline to exercise jurisdiction, the sanctions mechanism provided for in the Compact would be rendered useless and the member States would be without an alternative forum in which to enforce their claims Plainly this was not the intent of the parties or Congress, and this Court is the appropriate institution to protect those expectations

ARGUMENT

This Court traditionally has considered two factors in determining whether to exercise its original jurisdiction under Article III, Section 2 of the United States Constitution,[4] and 28 U S C § 1251(a)

> Determining whether a case is "appropriate" for our original jurisdiction involves an examination of two factors First, we look to the "nature of the interest of the complaining State," focusing on the "seriousness and dignity of the claim" Second, we explore the availability of an alternative forum in which the issue tendered can be resolved

Mississippi v *Louisiana*, 506 U S 73, 77 (1992) (citations omitted) Significantly, the Court rarely has declined to exercise its original jurisdiction in a case such as this one, which involves a dispute among sovereign states concerning the interpretation and enforcement of an interstate compact See, *e.g.*, *Texas* v *New Mexico*, 462 U S 554, 567-68 (1983) ("If there is a compact, it is a law of the United States, and

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[4] "In all Cases in which a State shall be a Party, the supreme Court shall have original Jurisdiction" U S Const art III § 2, cl 2

our first and last order of business is interpreting the compact ") (citation omitted)

A. The Nature Of The States' Interest Is Of Sufficient "Seriousness And Dignity" To Warrant The Court's Exercise Of Original Jurisdiction.

Resolution of a fundamental and irreconcilable difference among the States concerning the proper interpretation of an interstate compact is the archetypical matter warranting the Court's exercise of its exclusive, original jurisdiction This Court consistently has recognized its "'serious responsibility to adjudicate cases where there are actual, existing controversies' between the States" *Oklahoma* v *New Mexico*, 501 U S 221, 241 (1991) (quoting *Arizona* v *California*, 373 U S 546, 564 (1963))

Here, the Compact was enacted by eight States and consented to by Congress for the express purpose of "promot[ing] the health and safety of the region" Compact, Art 1, 99 Stat at 1872 Since South Carolina withdrew from the Compact in 1995 due to North Carolina's failure to develop the next regional disposal facility, the member States have been without a regional facility Without the requisite funds to obtain disposal capacity, the Compact faces the "prospect of numerous facilities within our states either storing waste indefinitely or terminating those operations which utilize radioactive material due to the lack of disposal facility" Tr at 13 (App B 24a) Thus, the States' attempt to provide for the safe and efficient disposal of low-level radioactive waste for the region was prevented by the actions and failures to act of North Carolina These acts and omissions violated North Carolina's obligations under the Compact in two ways first, by failing to perform its contractual duties as the designated second host State, and second, by failing to comply with the Sanctions Order validly issued against it

By signing on to the Compact, North Carolina agreed to accept a designation as a host State It also formally accepted the designation by enacting N C Gen Stat §§ 104F and 104G and by appropriating funds for site development That designation carried with it the responsibility of funding, licensing, developing and operating a regional disposal facility for 20 years In return, North Carolina would have been repaid fully for its expenses from the revenue generated by the facility Moreover, subsequent facilities would have been sited in other States, ensuring North Carolina's ability to have a safe and convenient location for disposing of its low-level radioactive waste for generations to come

North Carolina refused to honor this arrangement or to accept its manifest responsibility for the project Although for years the Commission provided funds to North Carolina to assist with the project, when the Commission's source of revenue was eliminated and the Commission no longer could contribute to the project, North Carolina refused to cooperate with the Commission and others to find alternative funding sources Instead, North Carolina terminated the project, thereby disavowing its statutory, contractual and equitable obligations to serve as the next host State under the Compact

Second, North Carolina has refused to comply with the Sanctions Order imposed by the Commission following a full and fair hearing In fact, North Carolina refused entirely to participate in the Sanctions Hearing, claiming that it no longer was subject to the jurisdiction of the Commission, having announced its intention to withdraw from the Compact in July 1999 North Carolina is mistaken Although North Carolina enacted legislation with the intent to withdraw from the Compact in July 1999, its preexisting obligations under the Compact did not cease until either the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction See Compact, Art 7(F), 99 Stat at 1879 Therefore, the Commission retained plenary authority to impose the sanction at issue here, having found

after a full and fair hearing that North Carolina failed to fulfill its obligations both under and arising out of the Compact In sum, North Carolina has refused without justification to comply with the Commission's Sanction Order

North Carolina's actions have left the remaining member States in a precarious position vis-à-vis the disposal of low-level radioactive waste and have exposed the states to potentially serious threats to the public health and safety of their citizens As this Court explained in *Missouri* v *Illinois*, 180 U S 208, 241 (1901), in instances in which "the health and comfort of the inhabitants of a State are threatened," the State must be allowed a remedy And given that "[d]iplomatic powers and the right to make war hav[e] been surrendered to the general government," the remedy must be found in the constitutional provision of original jurisdiction in this Court *Id.* As Commissioner Mobley of Tennessee noted during the Sanctions Hearing, "nothing can reclaim the time that has been lost" Tr at 13 (App B 24a) However, this Court's timely and appropriate exercise of original jurisdiction to resolve the dispute will help mitigate the greater problems looming ahead for the member States if this matter is not resolved expeditiously

B. The States Have No Adequate Alternative Forum For Resolving Their Dispute With Another Sovereign State.

This Court has exclusive subject matter jurisdiction over suits among States 28 U S C § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States") Indeed, the United States expressly recognized that a suit by a member State of the Compact against another member State "to enforce the Compact and seek an appropriate remedy" would fall within this Court's exclusive original jurisdiction U S Brief at 18 (App A 21a) See *supra* at 19

Moreover, this Court is the only forum in which the States are guaranteed to receive a fair and impartial ruling as to the proper interpretation and enforcement of the Compact that regulates the relevant relationship among them As the Court stated in *West Virginia ex rel. Dyer* v *Sims*, 341 U S 22 (1951)

> It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States can be unilaterally nullified, or given final meaning by an organ of one of the contracting States A State cannot be its own ultimate judge in a controversy with a sister State To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the "federal common law" governing interstate controversies, is the function and duty of the Supreme Court of the Nation

Id at 28 (citation omitted)

Plaintiffs came to this Court only after their failed attempt to resolve this dispute through the Congressionally-approved mechanism set forth in the Compact There is no pending proceeding on this matter in any other jurisdiction, nor is there another jurisdiction available in which a State would not be "its own ultimate judge in a controversy with a sister State" *Id* Requiring Plaintiffs to submit the determination of their compact claims to a North Carolina court, or any other lower federal or state court, is inconsistent with one of the central purposes of this Court's original jurisdiction "the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own" *Ohio* v *Wyandotte Chems. Corp*, 401 U S 493, 500 (1971) (citing *Chisholm* v *Georgia*, 2 U S (2 Dall) 419, 475-76 (1793)) Moreover, requiring the parties to litigate this dispute elsewhere will result only in delay and expense This matter ultimately would return to this Court, but only years and many hundreds of thousands of

dollars later – time and money the Commission and the States do not have to spare This problem is particularly acute given that the States are subject to ongoing injury and the threat of even greater harm until this matter is resolved and the member States are able to obtain the disposal capacity North Carolina solemnly undertook to develop but failed to construct, even after the Commission provided almost $80 million to assist North Carolina in those efforts

CONCLUSION

The Court should grant Plaintiffs' motion for leave to file the Complaint Plaintiffs further request that the Court order North Carolina to show cause why the Compact Commission's sanction decision should not be summarily affirmed and enforced

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June 3, 2002

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